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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT & LICENSE NO. 01-07011 APPLICANT: Twin Falls Canal Company & North Side Canal Company	**POST-HEARING BRIEFING IN SUPPORT OF CANAL COMPANIES' PROTEST OF TERM LIMIT CONDITION AND VOLUMETRIC LIMITATION ON WATER RIGHT LICENSE NO. 01-7011**

COMES NOW, the North Side Canal Company and Twin Falls Canal Company, Petitioners, by and through their counsel of record, the law firm Barker Rosholt & Simpson, LLP, and hereby submit this Post Trial Memorandum following the hearing held on June 2, 2010. The hearing held on June 2, 2010, on the Protest and Petition for Hearing related specifically to the term limit condition and volumetric limitation included in the license issued October 20, 2008.

INTRODUCTION

The North Side and Twin Falls Canal Companies, (hereinafter "Canal Companies") protested the license issued on October 28, 2008, because the license contained a new element, a new condition, and a substantially altered condition, that had never appeared in the permit issued

for the water right. When a party applies for and is granted a permit to develop a water right, it is anticipated that the party will be able to rely upon the restrictions and limitations contained in the permit to determine the feasibility and cost-effectiveness of developing the project for which the water will applied to beneficial. Even a holder of a hydropower water right permit is entitled to assurances that if the project is developed in conformance with the limitations contained in the permit, then the Department will fulfill its duties in a timely manner and issue a license in conformance with the permit.

In this case the Canal Companies made proof of beneficial use of the water right at the Milner hydroelectric facility in 1993. The permit for the Milner project was approved on June 29, 1977, and contained one condition requiring the Canal Companies to install a measuring device as part of the diversion works. Counsel for the Canal Companies, realized that the permit did not contain a subordination condition, but anticipating that the Department may attempt to re-open the permit to insert such a condition contacted the Idaho Water Resource Board and the Department in 1982 to negotiate the terms of such a condition. An agreement with the Director of the Department as to the scope of the subordination condition was reached in 1987, but was never included in the permit. The Department did not at that time attempt to add a term limit condition to the permit. Neither did it claim that a volume limitation was anticipated for the project.

When the license was issued on October 20, 2008, the Department inserted a new condition, a substantially altered subordination condition, and a volume limitation. The Department had opportunities prior to licensure to either insert the new conditions in an amended permit, or to at least notify the Canal Companies that it intended to add new conditions at the time of licensure. It did neither. Idaho Code §§ 42-203B(6) and (7), and the Department's

Water Appropriation Rule, IDAPA 37.03.08.050.03 (hereinafter "Rule 50.03") require that if the Director elects to add a term condition to a hydropower water right, the Director must add it to the permit. Waiting to add the term condition until licensure in violation of Idaho Code § 42-203B(6) and (7), and Rule 50.03, constitutes an abuse of the Director's discretion. The Department's calculation of the volume limitation added to the license, as demonstrated at the hearing on June 2, 2010, was exercised in an arbitrary and capricious manner, and was intended to serve the additional unauthorized purpose of a secondary level of subordination on the right. For these reasons, the license must be remanded to Director to be amended and re-issued without the term limit condition, and if a volume limit will apply, then the limit reflect the actual production capacity of the Milner hydroelectric plant confirmed by the proof of beneficial use made in 1993.

STATEMENT OF PERTINENT FACTUAL AND PROCEDURAL HISTORY

On March 30, 1977, the Canal Companies filed an application for a water right permit to develop a hydropower project at Milner Dam.[1] The application was approved on June 29, 1977 and a permit was issued containing one condition, requiring the Canal Companies to install a measuring device as part of the diverting work for the project.[2] The development of the Milner project began during the time that litigation concerning the subordination of Idaho Power's water rights at its Swan Falls hydroelectric facility was ongoing. Counsel for the Canal Companies was concerned about the effect that a subordination condition in the Milner permit would have on the continued viability of the Milner project. In a letter to Reed Hansen, then Chairman of the Idaho Water Resource Board, Mr. Rosholt explained the necessity for clarification of the Board's

[1] Affidavit of Shelley M. Davis in Support of Canal Companies' Memorandum in Opposition to Idaho Water Resource Board, Upper Snake Water Users' and Ground Water Districts' Motions for Summary Judgment, already of record in this action, (hereinafter "Davis Aff."), Ex.3, Application for Permit.
[2] *Id.*

position on subordination of the Milner project.[3] He explained that in 1977 when "Permit No. 01-7011 was issued by the Department...no conditions attached...in other words, no subordination of power to irrigation was imposed as a condition of the issued permit."[4] Mr. Rosholt then requested that the Idaho Water Resource Board adopt a policy in support of the Milner hydroelectric project, and impose no subordination condition on the permit.[5] At that time the Department took no action to inform the Canal Companies that it intended to either condition or not condition the water right with a term limit condition, subordination condition, or apply a volume limitation on the permit or license.

The Canal Companies on at least five occasions between 1977 and 1993, when proof of beneficial use was provided to the Department, re-opened the Milner hydropower permit.[6] In September 1977, the Canal Companies sought an amendment of the permit to approve "alternate points of beneficial use for power purposes."[7] On four more occasion, in 1982, 1987, 1990 and 1992, the Canal Companies made applications for extensions of time to make proof of beneficial use because of delays in the Federal Energy Regulatory Commission licensing process.[8] All of the extensions were approved by the Department. In response to the 1987 request, the Department modified the permit by including the following subordination provision:

> The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River basin of the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the consumptive beneficial use of water, other than hydropower and groundwater

[3] Davis Aff., Ex. 7, May 3, 1982 letter from Rosholt to IWRB Chairman Hansen.
[4] *Id.*
[5] *Id.*
[6] Davis Aff., Ex. 23, Final Order Issuing License No. 01-7011, Findings of Fact.
[7] *Id.*
[8] *Id.*

> recharge within the Snake River basin of the state of Idaho initiated later in time than the priority of this permit.[9]

This subordination condition was the only condition that was ever included on the Milner hydropower permit no. 01-7011 after its initial approval in June 1977, despite the permit being reopened at least five times after it was initially approved.[10]

The Canal Companies submitted their initial application for a Federal Energy Regulatory Commission (hereinafter "FERC") license in July, 1984.[11] The FERC Order Issuing the license for the Milner hydroelectric project was issued on December 15, 1988.[12] Proof of beneficial use was submitted by the Canal Companies, with an accompanying Beneficial Use Field Examination Report on October 29, 1993.[13] The Department did nothing more concerning issuing a license until the Canal Companies on at least two occasions, in 2006 and 2007, requested that the Department issue the license. On July 27, 2006, then Director Dreher indicated in a letter that "the issuance of a license for the [Milner hydroelectric] water right is pending."[14] On October 20, 2008, the Department of Water Resources issued a Final Order issuing the Milner License No. 01-7011.[15] The license contained the new subordination condition, an additional condition not contained in the permit, and a volumetric limitation that was not included in the permit.[16] The Canal Companies filed their Protest and Petition for

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[9] Davis Aff., Ex.9, November 18, 1987 letter from Keith Higginson, Dir. IDWR to John Rosholt, counsel for the canal companies.
[10] The permit was re-opened three times after the Idaho Water Resource Board adopted its resolution requesting term limit conditions to be added to hydropower permits in 1984, and after the adoption of Idaho Code §§ 42-203B(6) and (7) in 1985.
[11] Davis Aff., Ex. 10, Excerpted portions of the FERC Application.
[12] Davis Aff., Ex. 12.
[13] Davis Aff., Ex. 13, Beneficial Use Field Examination Report.
[14] Davis Aff., Ex.15, July 27, 2006 letter from Dir. Dreher to Sen. Coiner.
[15] Davis Aff., Ex.23, Final Order Issuing License
[16] *Id.*

Hearing on November 4, 2008.[17] The Idaho Water Resource Board and certain ground water user entities sought intervention which was granted by the hearing officer.

The Intervenors moved for summary judgment on the question of the extent to which the Canal Companies' hydropower rights at the Milner hydroelectric plant could be subordinated to ground water recharge. This hearing officer issued his Opinion and Order Granting Motions for Summary Judgment and Recommendation on April 29, 2010. A hearing was held on the remaining protested condition and volumetric limitation on June 2, 2010. The Department of Water Resources submitted pre-filed testimony of Mr. Shelley Keen in support of its licensing position prior to the hearing. As part of that pre-filed testimony, the Department attached Exhibit 2, the Idaho Department of Water Resources Appellant's Brief in an appeal of the Third District Court Order remanding the Idaho Power Company license no. 03-7018 to be re-issued without the term limit condition. While some of the legal analysis in the two actions does overlap, the facts of the two actions are obviously different, and this Court should weigh the facts and applicable law of this license appeal independently of the arguments and issues raised in the Supreme Court appeal of the Brownlee hydropower license. This brief summarizes the argument and position of the Canal Companies as a result of the proceedings to date in this action and the hearing concerning license no. 01-7011.

STANDARD OF REVIEW

The actions of an agency will be overturned if the action was taken "(a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency; (c) [was] made on unlawful procedure; (d) [is] not supported by substantial evidence on the record as a whole; or (e) [is] arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3). The

[17] Davis Aff., Ex.24, Protest and Petition for Hearing.

agency action will be affirmed unless substantial rights of the appellant have been prejudiced. I.C. § 67-5279(4).

ARGUMENT

The Director of the Idaho Department of Water Resources is not entitled to add a new term condition to a license for a hydropower water right, when the condition was never included in the application for permit, or the approved permit issued for the water right. Both Idaho Code § 42-203B(7) and the Department's own Rule 50.03, very clearly state that a term limit condition must be added to the "permit" for a water right. In this case, the permit was approved with one condition in 1977, and the Department had at least five opportunities initiated by the Canal Companies to review and revise the permit between 1977 and 1993, when proof of beneficial use was made. In 1987 the Director elected to add a subordination condition to the permit in response to one of the applications for extension of time to make proof of beneficial, but no other conditions were added. The Director cannot, fifteen years after proof of beneficial use is made, add new conditions to a license in violation of the Canal Companies' property rights.

Fundamental rules of equity also require the Department to give notice to a water right holder, prior to the time of licensure that the Department may elect to add a volume limitation at the time of licensing which could substantially reduce the amount of water that the licensee will be entitled to use at the project. Unless the Department adopts a rule announcing objective criteria to guide the Department's determination of the appropriate volume limit to apply to a license, any subjective determination based on unannounced and unpredictable criteria that the Department may rely upon to calculate such a limitation, is arbitrary and capricious. The Department's actions to calculate the volume limitation in this action were particularly egregious because the Department argues it was forced to choose at random what it believed to be a

representative water year on the Snake River due to faulty or malfunctioning USGS gauges during the time that proof of beneficial use was made. The volume restriction applied to license no. 01-7011 in this case was calculated and applied arbitrarily and capriciously, and would work to limit the amount of water available for generation at the Milner plant as a second level of subordination, affecting a substantial right of the Canal Companies.

The Department relies upon Idaho Code § 42-203B(6) to support its position that the Director has unfettered discretion to apply a term limit condition to a water right at the time of licensure. Idaho Code § 42-203(B)(6) states:

> (6) The Director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.
>
> Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date [July 1, 1985] of this act.

I.C. § 42-203B(6). This code section authorizing the Director to subordinate and add term conditions to hydropower water rights, is also limited and modified by Idaho Code § 42-203B(7) specifically dealing with term limits to be added to hydropower water rights. It states:

> (7) The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term shall extend and for purposes of determining such date shall consider among other factors:
>
> (a) The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;
>
> (b) The policy of the Idaho public utilities commission (IPUC) regarding the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory policy act of 1978 (PURPA);
>
> (c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;
>
> (d) Existing downstream water uses established pursuant to state law.

> The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

I.C. § 42-203B(7), (emphasis added).

The Idaho Department of Water Resources adopted a Water Appropriation Rule, interpreting this statute on July 1, 1993. The rule states:

> 03. **Applications and Existing Permits That Are Junior and Subordinate.** Applications and existing permits approved for hydropower generation shall be junior and subordinate to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code.

IDAPA 37.03.08.050.03, emphasis added. In this case, the Department of Water Resources never added a term condition to the Milner hydropower water right permit. It was not added until the ***license*** was issued, fifteen years after proof of beneficial use had been made. The Director violated the law when he applied the term condition to the Milner hydropower water right for the first time at licensure in violation of Idaho Code § 42-203B(7), and Rule 50.03, and affected a substantial property right of Idaho Power Company.

A water right holder who has complied with Idaho Code § 42-219 and proven up its water right, is entitled to more than a "mere hope" of a water right license. The licensing process for a hydropower water right is the same statutory process employed by the Director to license any other type of water right. Regardless of the type of the right, the Director has the same mandatory duty to timely issue a license for the water right in conformance with the permit. In

this case, the Director breached his obligation to issue such a license, and instead waited fifteen years after proof of beneficial use had been made by the Canal Companies. The Director then issued a license in derogation of the Department's own rule requiring that a term limit, or subordination condition, be included either in the application for permit or water right permit, and arbitrarily and capriciously calculated a volume limitation that was also not added until licensing of the right. These actions violate Idaho law and constitute an abuse of discretion by the Director of the Department prejudicing substantial rights of the Company. The action must be corrected in the final order.

I. The Director Abused His Discretion When he Added the Term Limit Condition and Volumetric Limitation to the Milner Hydropower Water Right For the First Time at Licensing:

A. The Director Violated Idaho Code §§ 42-203B(6) and (7):

Idaho Code § 42-203B(7) requires that in those instances where the Director elects to use his discretion afforded under Idaho Code § 42-203B(6) to condition a hydropower water right with a term limit, it must be done at the time of approval of the application for permit, or as soon thereafter as is practicable. I.C. § 42-203B(7). The Department's water appropriation Rule 50.03 also requires that any term limit condition that the Director may wish to impose on a hydropower water right be included at the time of permitting. IDAPA Rule 37.03.08.050.03. In this case, despite having at least five opportunities to add such a condition after the initial application was approved, the Director instead included the term limit condition and volumetric limitation for the first time at licensing. The Director's failure to follow the law of the state of Idaho and his own administrative rule to include such a condition on the permit amounts to an abuse of discretion and should be corrected through the final order. Furthermore, the term

condition purports to allow the Director to cancel the Canal Companies' Milner hydropower water right entirely, which prejudices a substantial property right of the Canal Companies. Therefore, the license must be remanded to be re-issued without the term condition.[18]

Idaho Code § 42-203B(7) was adopted as part of Idaho Code § 42-203B contemporaneously with § 42-203B(6). Where the language of a statute is unambiguous, the fact finder is bound to look only to the literal words of the statute, without resort to outside materials in order to construe the statute. *In re Idaho Department of Water Resources Amended Final Order Creating Water District No. 170, Thompson Creek Mining Co. v. Idaho Department of Water Resources*, 148 Idaho 200, 210-211, 220 P.3d 318, 328-329 (2009), *citing Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). During the hearing in this case the Department attempted to convince this Hearing Officer to read Idaho Code § 42-203B(6) in a vacuum without the benefit of the accompanying code section, Idaho Code § 42-203B(7).[19] However, Idaho Code § 42-203B(7) expressly dictates the manner in which the Department may apply term limits to hydropower water rights.

Idaho Code § 42-203B(6) gives the Department the authority to either condition, or not condition a hydropower water right permit or license by adding a subordination provision or term limit condition. However, Idaho Code § 42-203B(7) expressly requires that where the Department decides to add a term limit condition, the condition must conform to one of the prescribed time periods set forth in the code section, and it must be added to the permit at the time of issuance of the permit, or as soon as is practicable thereafter. I.C. §§ 42-203B(6) and 42-

[18] The Canal Companies will not argue their interrelated position concerning the subordination condition that was the subject of this hearing officer's April 29, 2010, Opinion and Order Granting Summary Judgment in this brief. That matter is stayed pending the resolution of these proceedings concerning the term limit condition and volumetric limitation and will be addressed by the Canal Companies on Reconsideration when that subject is reopened in this matter.

[19] Exhibit 1 attached hereto, Transcript of Hearing on Water Right Protest No. 01-7011, held June 2, 2010 (hereinafter "Transcript,") p. 102, l. 1-p. 104, l. 19.

203B(7).[20] "Language of a particular statute need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature's intent." *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197, 46 P.3d 9, 14 (2002), *citing Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992), additional citations omitted. "Statutes and ordinances should be construed so that effect is given to their provisions, and no part is rendered superfluous or insignificant." *Friends, supra*, 137 Idaho at 197, 46 P.3d at 14 (2002). The authority to modify a hydropower water right holders rights by inserting a term condition is expressly limited by the time requirements in Idaho Code § 42-203B(7).

The Director, if he chooses to condition a hydropower water right with a term limit pursuant to Idaho Code § 42-203B(6), must add the condition the permit, or add it as soon thereafter as is practicable. In this case, despite having had five opportunities to add a term limit condition, and even exercising his authority to add a subordination condition pursuant to Idaho Code § 42-203B(6) in 1987, the Director never added the term condition to the permit. The Director's discretion to condition hydropower water rights pursuant to Idaho Code § 42-203B(6) does not extend so far that he can exercise that discretion in violation of the law. For that reason, the term limit condition must be removed from the Canal Companies' hydropower water right no. 01-7011.

B. The Director Violated Rule 50.03:

The Department also violated Rule 50.03 when it issued the license with new conditions never previously included in the permit for water right no. 01-7011. On July 1, 1993, the

[20] The requirement for inclusion of all terms and conditions that a particular water right holder will be subject to is necessary at the time of permitting because that permit will evolve into a water right license. A license is defined by the Department as "[t]he certificate issued by the director in accordance with Section 42-219, Idaho Code, confirming the extent of diversion and beneficial use of the water that has been made in conformance with the permit conditions." IDAPA 37.03.02.010.15, emphasis added.

Department promulgated water appropriation Rule 50.03, the rule that governs the inclusion of subordination and term conditions on hydropower water rights. It states:

> **03. Applications and Existing Permits That Are Junior and Subordinate.** Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes **shall contain** a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code.

IDAPA 37.03.08.050.03, emphasis added. The rule represents the Department's interpretation of how it would generally apply Idaho Code § 42-203B(6) and (7). The rule remains in effect as promulgated in 1993 and the Department has not amended it. "Administrative regulations are subject to the same principles of statutory construction as statutes." *Stafford v. Idaho Dept. of Health and Welfare*, 145 Idaho 520, 533, 181 P.3d 456, 459 (2008). Therefore, an unambiguous rule should not be construed, and each word must be given its plain and ordinary meaning. *Permit No. 36-7200 In the Name of Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992). Further, statutes and rules should not be read in such a manner as to render any language thereof inoperable or superfluous. *In re Idaho Department of Water Resources Final Order Creating Water Dist. 170*, 148 Idaho 200, 210-211, 220 P.3d 318, 329 (2009), *citing Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558, 561 (2007), additional citations omitted. In this case the rule states that a permit "shall contain" a term limit condition, if one is to be applied. In this case, the Milner hydropower permit never contained a term limit condition, and therefore, the Director is precluded from adding such a condition at licensing.

Rule 50.03 states "[a] permit for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B, Idaho Code." *Id.*, emphasis added. The Director cannot use the terms water right permit and a water right license interchangeably. The Department's Beneficial Use Examination Rules, IDAPA 37.03.02, define a water right license as "[t]he certificate issued by the director in accordance with Section 42-219, Idaho Code, confirming the extent of diversion and beneficial use of the water that has been made in conformance with the permit conditions." IDAPA 37.03.02.010.15, emphasis added. In contrast, a permit is defined as "[t]he water right document issued by the director authorizing the diversion and use of unappropriated public water of the state or water held in trust by the state." IDAPA 37.03.02.010.22. The Department's Water Appropriation Rules, also set forth a number of additional circumstances under which the Director may modify or add additional conditions to a permit. See IDAPA 37.03.08.050.05-12. There is no rule or authority that gives the Director the discretion to add a new condition to a water right license that had never been included on the permit.

A review of the records of other hydropower water right licenses discloses that the Department understands that its authority to either condition or not condition a hydropower water right with subordination or term limit conditions must be exercised when the permit is issued, or as soon thereafter as is practicable, but at the very least, the license cannot contain conditions that have never before been added to the permit. In support of its position concerning the inclusion of a term limit condition on the Brownlee hydropower license no. 03-7018 for the first time at licensing, the Department issued a Statement of Position, in lieu of submitting to discovery. In it the Department stated:

> The term review condition on Water Right License 03-7018 is used on water right licenses for power generation if the project requires Federal Energy Regulatory

> Commission (FERC) approval. This particular term review condition, modified to refer to the specific FERC authorized project or license, also appears on at least 6 water right licenses issued by the Department. (See attachment 1.) The Department has employed a similar term review condition on 32 water right permits requiring FERC approval. (See Attachment 2.)[21]

A review of the Idaho Department of Water Resources back files for the 6 licensed hydropower water rights identified by the Department as containing the term limit condition indicates that for all of the hydropower water rights identified, except Idaho Power's water right no. 03-7018, and the Milner hydropower water right 01-7011, the term review condition was included in the permit initially issued by the Department, or was added sometime between the permit being issued, but before licensure. The Department has only attempted to issue a term condition at the time of licensing for two water rights, the Milner license, and license 03-7018, where the condition was declared to be added in violation of the law by a Washington County District Court.[22]

The first license identified in the Department Statement of Position is hydropower water right no. 29-07578.[23] The application for the water right was submitted on March 31, 1981, prior to the adoption of Idaho Code §§ 42-203B(6) and (7). The permit for that water right was issued on September 24, 1990, and contained condition no. 13, a term limit condition that "[t]he diversion and use of water under this permit and any license subsequently issued is subject to

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[21] Exhibit 2 attached hereto, Department's Statement of Position Concerning water right no. 03-7018, emphasis added.

[22] Application of the term limit condition is unconstitutional as the language inserted is vague, indefinite, arbitrary and capricious, and reserves the department broad unlimited discretion in the exercising of its powers and canceling of Idaho Power's license on a whim, without due process of law. To prove a statute is unconstitutional "as applied", the party must only show that, as applied to the defendant's conduct, the statute is unconstitutional. *State v. Korsen,* 138 Idaho 706, 712, 69 P.3d 126, 132 (2003). Idaho Code §§ 42-203B (6) and (7) mandate that if the director is going to limit a permit or license for power purposes to a specific term the director shall designate the number of years through which the term of the license shall extend taking into consideration a minimum of four statutory factors. I.C. § 42-203B(7). The statute does not allow the director to arbitrarily determine when to review the license, and furthermore does not give an indefinite timeframe in which the license will be reviewed or modified. The director could not have given himself any broader terms in which to exercise his discretion to condition the license, including a provision allowing him to cancel a permit, "u*pon appropriate findings relative to the interest of the public,*" which is vague at best, and does not provide any type of due process.

[23] *Id.*

review by the Director on the date of expiration of any license issued by the Federal Energy Regulatory Commission."[24] It goes on to state that upon appropriate finding of the Director that the public interest requires it, "the Director may cancel all or any part of the authorized use herein and may revise, delete or add new conditions under with the right may be exercised."[25] The license was issued on June 4, 2001 containing a modified condition at no. 8. The term limit condition was added to the permit prior to the Department's adoption of Rule 50.03.

The next license identified was for hydropower water right no. 29-7772. It too contained the term limit condition at no. 13 in the permit issued September 24, 1990. The language of the term condition was identical to the language contained in the permit for water right no. 29-7578. The application for this water right was made on August 1, 1984, before the adoption of Idaho Code §§ 42-203B(6) and (7).[26]

Two additional licenses, which turned out to be companion licenses, identified as containing the term limit condition were for water right nos. 32-7128 and 32-7136. These water right applications were protested by local interested individuals.[27] The Permit issued as a result of the conclusion of the protest proceedings and the Order issuing the permit included a term condition, at no. 11, for both permits, on March 27, 1985.[28] It was added prior to the adoption of Idaho Code §§ 42-203B(6) and (7), and prior to the adoption of Rule 50.03.

The final hydropower license identified by the Department as containing the term limit condition, water right no. 47-7768, also included the term condition in the permit when it was issued on October 31, 1986.[29] The term condition was added soon after adoption of Idaho Code

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[24] Exhibit 3, Excerpted Portions of Water Right backfile for no. 29-7578.
[25] *Id.*
[26] Exhibit 4, Excerpted portions of water right backfile for no. 29-7772.
[27] Exhibit 5, Excerpted portions of water right backfiles for nos. 32-7128 and 32-7136.
[28] *Id.*
[29] Exhibit 6, Excerpted portions of water right backfile for no. 47-7768.

§§ 42-203B(6) and (7), but before adoption of Rule 50.03. The license was issued on March 6, 2008, and contained the term condition, slightly modified from the original version, as condition no. 5.[30]

Additional review of the historical records of the Idaho Department of Water Resources demonstrates that the Department understood that the term and subordination conditions contemplated by Idaho Code § 42-203B(6) and (7) were required to be included in the permits prior to time of licensure, even if that required re-issuing an amended permit. For hydropower water right no. 01-7010 issued to the North Side Canal Company, the Department entered an order amending the permit that had been issued June 29, 1977, to add a term condition and a subordination condition to the already issued permit.[31] In that order the Department specifically states:

> WHEREAS, permit no. 01-7010 was issued prior to the date of the Idaho Water Resource Board's resolution of July 25, 1984 and is not conditioned with the language making the permit or subsequent license which may be issued subject to periodic local public interest review by the Director and to other conditions of approval traditionally placed on hydropower permits[.]

Id., emphasis added. In this statement the Department implicitly recognizes that a subsequent license must "confirm[] the extent of diversion and beneficial use of the water that has been made in conformance with the permit conditions." IDAPA 37.03.02.010.15, emphasis added. In order to accomplish this goal, the Department notified North Side Canal Company, long before issuance of the license, and put the permit holder on notice that the license would be subject to additional conditions being inserted in the permit.

Finally, the Department issued a license for Idaho Power Company hydropower water right, no. 65-12096, on November 8, 1999, for its Cascade hydropower facility. Similarly to the

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[30] *Id.*

[31] Exhibit 7, Order in the Matter of Permit No. 01-7010 in the Name of the North Side Canal Company, Ltd.

Milner license, the Cascade license included a term limit condition in the license that had not been contained in the water right permit.[32] Idaho Power petitioned the Department for reconsideration of inclusion of the term limit condition in the water right, arguing the constitutional amendment allowing regulation of hydropower water rights could not have intended to strip the water right holder of the underlying property value of the water right even if it could no longer be used for hydropower purposes, as I.C. § 42-203B(6) indicates may be possible. Importantly, the Department granted the Idaho Power's petition and re-issued the license without the term condition.[33] This is yet another example of the Department's understanding that its authority to either condition or not condition a hydropower water right with subordination or term limit conditions must be exercised when the permit is issued, or as soon thereafter as is practicable, but at the very least, the license cannot contain conditions that have never before been added to the permit.[34] Although the facts in this case are similar to the Cascade license, the Department has nonetheless attempted to add a term condition to the Milner license n violation of the law. The Department's inconsistent application of the law involving hydropower water right licenses cannot be sustained.

Both Idaho Code § 42-203B(7) and the Department's Rule 50.03 plainly state that a term condition to be applied to a hydropower water right must be included in the permit. The permit issued for the Milner hydropower water right no. 0-7011, approved on June 29, 1977 contained one conditions, requiring the installation of a measuring device.[35] In 1987, as a result of discussions beginning in 1982, and in response the Canal Companies application for an extension

[32] Exhibit 8, Excerpts of the backfile for Cascade Hydropower water right no. 65-12096.
[33] During the June 2, 2010, hearing Mr. Keen recalled being involved with the Cascade petition for reconsideration, but was not privy to the determination to remove the term limit condition. Exh. 1, Transcript, p. 82, l. 7-p. 87, l.4; p. 104, l. 5-p. 105, l. 10.
[34] Importantly, the permit at issue in this proceeding, 03-7018 did include a subordination provision at the time the permit was issued allowing the Respondent to develop the project with "eyes wide open" as to that provision.
[35] Davis Aff., Ex. 3.

of time to demonstrate beneficial use, the Department added a subordination condition.[36] No amended permit was ever issued for the water right adding a term condition.

Where an agency's interpretation and application of the statute and rule contradict the clear and unambiguous expression of the legislature, then the agency's construction will not be followed. *Permit No. 36-7200 In the Name of Idaho Department of Parks and Recreation v. Higginson*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992), *also see J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). Idaho Code §§ 42-203B(6) and (7) authorize the Director to either condition, or not condition, a hydropower water right with a subordination or term limit condition. If the Director elects to use his discretion to add such a condition, it must be done at the application for permit or permit stage of the process. The plain meaning of Rule 50.03 further requires the Department, if it intends to include a term condition in the license, to first include such a condition in the permit. The history of the Department's application of the statute and rule, the public policy of water rights appropriation, and the laws of the development of water rights in the State of Idaho, which assure to a water right holder who has complied fully with the terms of their water right permit a license confirming such use, also require that the license be remanded and issued again containing no term limit condition.

C. The Director Violated Idaho Law Concerning the Issuance of New Conditions in Licenses:

One important question before this Hearing Officer, is at what point does an applicant, permittee, or licensee, obtain a protectable property interest in its water right, one that the Department cannot fundamentally alter at the time of licensing. The Department invites the hearing officer to interpret § 42-203B(6) by itself without reference to the long line of pre-

[36] Davis Aff., Ex. 9.

existing statutes governing water rights appropriations representing the history of water law and the licensing process in Idaho. Nothing in Idaho Code § 42-203B, and in particular § 42-203B(6), can be interpreted as negating or rendering moot the other statutes or existing case law applying to water right appropriations. The law of the construction of statutes, and cases interpreting statutes, requires this Court to presume that Idaho Code § 42-203B was intended to work in unison with the pre-existing law of the state. The instant case implicates more than the statute, and involves the extensive history of water law, water rights, the permitting and licensing processes, and the overall policies enmeshed with the Idaho Constitution, Idaho Code, and the case law interpreting the same, which has developed over a hundred years.

Statutory interpretation cannot be read in a vacuum or in isolation as the Department urges. *Lockhart v. Dept. of Fish and Game*, 121 Idaho 894, 828 P.2d 1299 (1992). It is assumed that when the legislature enacts or amends a statute it has full knowledge of the existing judicial decisions and case law of the state. *George W. Watkins Family v. Messenger,* 118 Idaho 537, 797 P.2d 1385 (1990). Furthermore, it is presumed that the legislature does not intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction. *Id.*

The Canal Companies fully complied with the conditions of their permit, and the law of the state of Idaho when the Companies submitted proof of beneficial use for the project in 1993.[37] Nevertheless, the Director elected to add a new *discretionary* condition at the time of licensing in 2008. It is *discretionary*, because it is a condition that is not mandated to be inserted. Rather if the condition *had not* been inserted, the license would still comply with the law pursuant to I.C. §§ 42-203B and 42-219. The Department argues that because the hydropower water right no. 01-7011 is for hydropower purposes it can ignore its duties under

[37] Davis Aff., Ex. 13.

I.C. § 42-219. However, Idaho case law interpreting the development of a water right dictates otherwise.

Many Idaho cases suggest that when a water right permittee makes an application for a water right, or re-opens its permit prior to submitting proof of beneficial use, that party has nothing more than an inchoate right subject to subsequent legislation and conditions, but once that party has done all that it can do to be in full compliance with Idaho Code § 42-219, a water right holder has more than "a mere hope" that the license will issue in conformance with the terms of the permit. The matter was addressed at length in the Canal Companies Memorandum in Opposition to Idaho Water Resource Board, Upper Snake Water Users', and Ground Water Districts' Motion for Summary Judgment at pages 36 through 42. The Canal Companies incorporate that argument herein.

In their appellate briefing of the Washington County District Court's decision on Idaho Power Company's Brownlee hydropower license, submitted as part of the pre-filed testimony of Shelley Keen in this action, the Department of Water Resources cited to *In Re SRBA Case No. 39576* (*Subcase No. 36-08099*), Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimants Notice of challenge, Snake River Basin Adjudication District Court Subcase No. 36-08099 (Jan. 11, 2000), (Addendum K), for the proposition that until a final license is issued for a water right, the water right represents nothing more than a mere hope for a water right. The case involved a hydropower water right for River Grove Farms, Inc., and contrary to the Department's insistence, does not stand for the proposition stated by the Department. The application for permit by River Grove Farms, Inc., (hereinafter "River Grove"), was approved by the Department in October 1983, ***containing*** a subordination provision imposed by the Department. Addendum K, at p. 17. The SRBA court on review

stated, "[u]pon approval of the permit, River Grove's predecessor-in-interest undertook construction of its hydropower facility with full awareness of the subordination condition imposed by IDWR. The permitee did not seek judicial review (of either the permit or the license) in accordance with the APA." *Id.* at 17, (emphasis added).

Accordingly, the facts in *River Grove* are distinguishable from the facts in this case. Contrary to the applicant in *River Grove*, the Canal Companies were not provided any indication at any time prior to licensing that the Director would elect to exercise his discretion to add a term limit condition at licensing, in violation of Idaho Code §§ 42-203B(6) and (7), and Rule 50.03. This distinction is important, because the Department relied upon *River Grove* for the proposition that the court ruled that a water right vests when a license is issued. However, what the Department cites to is merely dicta and had no bearing on the outcome of the case. In deciding the case, the court actually concluded:

> River Grove was issued a permit to appropriate water for hydropower purposes with the condition that any rights acquired under the permit would be subordinated to future rights for any other purpose. River Grove constructed its diversion works and hydropower facility in light of this condition. If River Grove was aggrieved by IDWR's action, it should have protested this action when the permit was issued, and certainly before it broke the first soil in construction...

Addendum K, at p. 28. The court held that River Grove's assertion was an improper collateral attack on the license, and that the applicant failed to exhaust its administrative remedies before the Department. As distinguished from the present case, the applicant in *River Grove* had notice from the outset of the conditions placed upon its permit and chose to move forward regardless. The rest of the court's decision is simply dicta, which contradicts the SRBA court's ruling in the case *Riley v. Rowan.*

Additionally the *Memorandum Decision in Riley v. Rowan*, issued by SRBA Judge Hurlbutt in 1997 continues to support the Canal Companies' position that it had more than a

mere hope that the Department would issue a license in conformance with the permit.[38] In *Riley v. Rowan,* the application for a water right was made in 1978. Proof of beneficial use was made by the applicant in 1983, the beneficial use field report was submitted in 1983, and license issued in 1995. In *Rowan* the Department did not issue the license until 12 years after proof of beneficial use had been submitted, which was problematic because the license was issued in the names of the original applicants, who were then deceased, and the status of the when the permit became a license would impact the rights of the beneficiaries and parties in the case. Ultimately, the court concluded that, "The failure of IDWR to perform its statutory duty to issue the license in a reasonable time requires the finding that Water Permit 22-07280 became a license by operation of law," on the date the applicant submitted proof of beneficial use in 1983. The Court reasoned:

> IDWR's breach of duty in issuing the license for this right caused the right to remain in a state of legal limbo. By holding the right in the permitting process, IDWR denied it the statutory recognition and benefits conveyed to licensed rights under Idaho Code § 42-220. IDWR's failure to timely exercise its duty left the permitted water right as a personal property interest, thereby denying it the real property right status to which it was legally entitled. Had IDWR met its duty, the ownership dispute may never have ripened because a license would have issued and become appurtenant to the land. This dispute has spawned lawsuits in Madison County and the SRBA an administrative proceeding before the IDWR. Had IDWR fulfilled its statutory obligation, none of these actions, with their substantial expense, would likely have been filed.
>
> IDWR's breach of its duty to issue licenses in a timely manner takes on constitutional dimensions as well. The Idaho Constitution holds inviolate the right to appropriate water. Idaho Const. Art. 15 § 3. The lengthy delay in issuing this license denied the water users their constitutional right to appropriate water. By leaving the right in the vulnerable permit status, it is not accorded the statutory recognition of a fully protected water right, as it would be when licensed.[39]

[38] Davis Aff., Ex. 38.
[39] Davis Aff., Ex. 38.

Judge Hurlbutt recognized that the duty of the department was to issue a license in a timely manner. He further understood that the failure to do so prejudices a substantial right of the water right holder.

In this case the Director failed to add the new condition, substantially altered condition, or water right volumetric limit to the permit prior to licensure. Even though the Canal Companies complied in all respects with the terms of the permit that was issued for the water right, at the time of licensure some fifteen years after proof of beneficial use was made, the Director altered those rights by issuing a license containing entirely new restrictions that had never before been disclosed to the Canal Companies. The Director's failure to add the conditions to the permit prior to licensure and then adding those conditions at licensing constitutes an abuse of discretion that severely impacts the property rights of Canal Companies. As such, the license must be remanded to be re-issued without the conditions added for the first time at licensing.

II. The Director Acted Arbitrarily and Capriciously When He Calculated the Volumetric Limit for the Milner Hydropower Water Right:

When the Department decided to issue a license for the Canal Companies' Milner hydropower water right no. 01-7011 in 2008, rather than set a volumetric limit equal to the proven beneficial use for the project, the Department explained that its policy instead is to attempt to determine what the 'average flow conditions' were when beneficial use was proven. In the case of the Milner water right, proof of beneficial use was made in October 1993 when the field examination report was filed. The Department chose the 1996 water year as representative of flow conditions it believed had been available in 1993 for a number of reasons, primarily a belief that the USGS gauging was unreliable for the time when the project was constructed and

proof of beneficial was made. However, none of those reasons are pertinent to this inquiry. What the Department failed to provide is any authority that would allow the Department to issue a volume limitation for less than the proven beneficial use of a project fifteen years after the project has been operating, and then expect the water right holder to appropriate a second water right for the project to make it whole as the Department suggested would be the Canal Companies' remedy at the June 2, 2010, hearing. There is no logic in such a representation.

Mr. Keen, on behalf of the Department represented that the 1996 water year was chosen by the Department to calculate the volumetric limit for the permit because he believed it to be the similar to the 1993 water year and within the acceptable range of time after the beneficial use proof was made in order to calculate such a number.[40] He also explained that the Department made an effort to find a year when flows in excess of 4,000 cfs were available at least 30 days during the year, in order to make the investment in the second turbine unit "economically beneficial."[41] Disturbingly, however, Mr. Keen goes on to assert that even though flows in addition to the volume limit may be available for use, if the Canal Companies were to use those flows then they would be in violation of the terms of their license, even though they are not using in excess of the approved beneficial use proven for the project.[42] Their remedy he explains would be to file for an additional water right to make up the difference between the recommended facility volume and the proven beneficial use of the project, 5714 cfs.[43] Finally, Mr. Keen admitted that the volume limit is intended to work as a secondary form of subordination in the event that the Department's non-conforming subordination remark is

[40] Exh. 1, Transcript, p. 12, l. 10-p. 16, l. 24.
[41] *Id.*
[42] Exh. 1, Transcript, p. 28, l. 21-p. 31, l. 15, also see p. 112, ll. 1-6.
[43] *Id.*

removed from the license.[44] There is no basis in the law to include a contrived volume limitation as some sort of "subordination" of the water right.

In a 1999 opinion of the SRBA court, Judge Wood examined the Department's inclusion of a volume limit on fish propagation water rights and found that adding a facility volume limit for non-consumptive water rights at the time of reporting those rights to the SRBA was impermissible.[45] In that case, the Department, when it recommended the rights to the SRBA added a remark limiting the volume of water to be used for certain fish propagation water rights.[46] Judge Wood determined that like hydropower, "fish production (pounds of fish raised) is, in reality, not dependent on the size of a given facility, rather production is mostly dependent on the flow rate of available water."[47] He also found:

> Additionally, the record is clear and it is uncontradicted that the particular water users at issue here use all available water from its source, not in excess of the limits of their respective licenses or beneficial use claims. The record is equally clear and uncontradicted that the available water from the respective sources fluctuates from time to time, either as a result of naturally occurring climatic conditions or by diversions of other users, or both....Lastly, it is universally agreed that these water uses for fish propagation are both beneficial and non-consumptive.[48]

Judge Wood admonished the apparently ulterior motives of the Department for including such a remark and found that it violated the fundamental principles of water law. He said:

> As such, the quantity element of the right (so long as it is applied to its intended beneficial use and is not wasted) could not be abused so long as the diversion rate did not exceed the allowable cfs, regardless of the number or size of the ponds, raceways, etc. It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the ponds or raceways were to actually grow fish in, it would be an increase in facility

[44] Exh. 1, Transcript, p. 112 l. 7-p. 113, l. 3.
[45] Exhibit 9, Order on Challenge of "Facility Volume" Issue and "Additional Evidence" Issue, Subcase No. 36-02708, *et al.*
[46] *Id.*, pp. 6-9.
[47] *Id.*, p. 7.
[48] *Id.*, pp. 7-8.

> volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. [49]

The situation is extraordinarily analogous to the volume limitation issue presented to this hearing officer.

At hearing the Department admitted it did not have reliable information for the year 1993, and so, 15 years after proof of beneficial use had been demonstrated and the Canal Companies had been operating within the terms of their permit, the Department arbitrarily chose 1996, an average Snake River water year in the Department's opinion, as the volume limit for the facility. It also admittedly added a second layer of subordination in order to limit the amount of production at the plant. The consequence if that if the volume is met, water that could otherwise be beneficially used to generate power under water right 01-7011 must instead be bypassed, contrary to how the water right has been used from the time proof of beneficial use was made in 1993.[50] In any event, Judge Wood determined that such limitations by the Department are not supportable.

> In other words, because the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these circumstances can economically produce 200 pounds of fish versus 100, there is no legitimate policy in water law for not allowing this to occur.[51]

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[49] *Id.*, p. 9.
[50] The Department has in other proceedings taken the position that if the Department chooses to make good on the term limit threat, then the hydropower water right holder can sue the state for inverse condemnation. Perhaps the volume limitation at issue here is an attempt to limit the damages that might be due to the Canal Companies in the event that comes to fruition, as Judge Wood suspected in the facility volume case in relation to mitigation.
[51] *Id.*, p. 17.

For the Department to assert in this case that if the Canal Companies meet the volume limit for the Milner hydropower plant and water is still available in the stream, then the Canal Companies must simply allow that water to pass through the facility without using it to produce power, is equally violative of both the prior appropriation doctrine, and the goal of obtaining the maximum beneficial use of water.[52]

The Department states that Beneficial Use Examination Rule 37.03.02.035.01.j. (hereinafter "Rule 35.01.j.") forms the requirement for the Department to add a volume limit to all licenses, except for municipal and fire protection uses.[53] The rule states: "[t]he field examiner does not need to show total volume water of for municipal and fire protection uses on the field examination report, unless the project works provide for storage of water." However, there is nothing in the beneficial use examination rules defining a volume limit or calculation. Importantly, Rule 35.01.o states that the "amount (rate and/or volume) of water shall be limited by the smaller of the permitted amount, the amount upon which the license examination fee is paid, the capacity of the diversion works or the amount beneficially used, including any statutory limitation of the duty of water." This rule certainly suggests that rate and volume of diversion are interchangeable terms or concepts. It also implies that where the Department cannot determine with certainty, as happened in this case, the amount beneficially used in 1993, it has the discretion to allow the "capacity of the diversion works" as the appropriate rate or volume of water to be diverted.

It is equally curious that rule 35.01.o uses the terms "rate" and "volume" and interchangeably. If this is the case, then shouldn't the volume and the rate of the water right represent the same figure? In this case, a rate of 5,714 cfs would equate to a volume of

[52] Exh. 1, Transcript, p. 62, l. 25-p. 64, l.17.
[53] *Id.*, p. 38, l. 14-p. 39, l. 18.

4,136,807 acre feet per year, nearly twice the volume limit set by the Department at licensure in 2008. Jon Bowling, an employee for Idaho Power Company, testified at the hearing on June 2, 2010, that in 1997, one year after the year chosen by the Department to calculate volume limit, the Milner hydropower project beneficially used 3,600,000 afa, and in 1998, the project beneficially used 2,800,000 afa. Therefore, from 2008 forward, if the hearing officer were to uphold the volume limit applied by the Department, the Milner plant would have had to bypass the water, 1,200,000 afa in 1997, and 400,000 afa in 1998, and lose the power that was generated in those years. As Judge Wood found, such a limitation violates the goal of obtaining the maximum beneficial use of water, and would needlessly waste a source of renewable energy that could be provided for Idaho's citizens.

If the Hearing Officer does determine that a volume limit may be included on this right, the Canal Companies request the Hearing Officer advise the Department to undertake a rulemaking to establish a rule defining the purpose and application of the volume element. If the Department believes as it represents it does, that volume limits must be applied to all water rights except municipal and fire protection rights, then water right applicants are entitled to know how the Department calculates the volume limits and at what time and under what circumstances the volume limit will be applied to a permit.

An administrative agency is required to promulgate a rule where it intends to take action that will (1) be of wide coverage, (2) the action will apply generally and uniformly, (3) such action will operate only in future cases, (4) the action prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) the action expresses agency policy not previously expressed, and (6) the action is in response to interpretation of law or general policy. *ASARCO Inc. v. State of Idaho*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003), *citing Woodland Private*

Study Group v. State of New Jersey, 109 N.J. 62, 533 A.2d 387 (1987). Based on the testimony of Mr. Keen at the hearing of this matter, all of the above elements appear to be met in this case, requiring the Department to formally promulgate a rule to dictate the parameters and use of the volume limit. Rule 35.01.j cited by the Department as the basis for its inclusion of the volume limitation does not inform water right applicants, holders, or beneficial use examiners of the purpose for the volume limit, or describe any of the information relief upon by the Department to make its limitation calculation, or even what that calculation is.

There is nothing in the law of the state of Idaho, the Department's water appropriation rules, or the beneficial use examination rules that requires a volume limitation to be included as an element of water right. Nothing in Idaho Code § 42-217 describing the requirements for making proof of beneficial use requires such proof to include a volume limitation. Nothing in Idaho Code § 42-219 defining the elements of a license requires it to include a volume limitation. In fact, the beneficial use examination rules indicate that "rate" and "volume" are interchangeable terms for purposes of the permitting and licensing inquiry so to the extent the rate of water right is established, then any volume limitation should be equal to the licensed rate for the water right. No volume limit should have been added to this license for the first time at licensure, but if the hearing officer determines that a term limit may be included in the license, then it should reflect the licensed rate of diversion, capacity, of the plant in order to accomplish the goal of obtaining the maximum beneficial use of the resource.

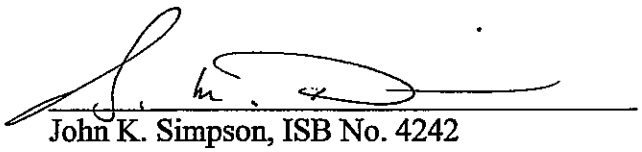
CONCLUSION

Based on the forgoing, the North Side Canal Company and Twin Falls Canal Company hereby request that this Court remand the License to the Department to remove the term limit

condition and volume limitation, or in the alternative, to remove the term limit condition and modify the volume limitation.

Dated this 30th day of June, 2010.

BARKER ROSHOLT & SIMPSON LLP



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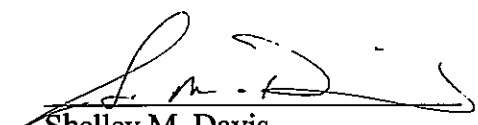
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2010, I served a true and correct copy of the foregoing **POST-HEARING BRIEFING IN SUPPORT OF CANAL COMPANIES' PROTEST OF TERM LIMIT CONDITION AND VOLUMETRIC LIMITATION ON WATER RIGHT LICENSE NO. 01-7011** upon the following persons via the method indication below:

Hearing Officer Schroeder via Electronic Mail.

Interim Dir., Gary Spackman Idaho Department of Water Resources 322 E. Front St. Boise, Idaho 83720-0098	____ U.S. Mail, Postage Prepaid __X_ Hand Delivered ____ Overnight Mail ____ Facsimile
Randall C. Budge Candice M. McHugh Racine Olson Nye Budge & Bailey, Chtd. P.O. Box 1391 Pocatello, ID 83204-1391 Fax No. (208)232-6109	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ____ Facsimile __X_ E-Mail (courtesy)
Robert L. Harris, Esq. HOLDEN KIDWELL HAHN & CRAPO, PLLC P.O. Box 50130 1000 Riverwalk Dr., Ste. 200 Idaho Falls, ID 83405 Fax No. (208)523-9518	____ U.S. Mail, Postage Prepaid ____ Hand Delivered ____ Overnight Mail ____ Facsimile __X_ E-Mail (courtesy)
Lawrence Wasden Steven L. Olsen Michael S. Gilmore Garrick Baxter Idaho Atty. Gen. Office P.O. Box 83720 Boise, ID 83720-0010 Fax No. (208) 854-8073	____ U.S. Mail, Postage Prepaid __X_ Hand Delivered ____ Overnight Mail ____ Facsimile __X_ E-Mail



Shelley M. Davis